YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS.

Published monthly during the Academic year, by students of the Yale Law School. P. O. Address, Box 893, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise, it is assumed that a continuation of the subscription is desired.

THE LIABILITY OF A MUNICIPAL CORPORATION FOR NEGLIGENCE IN THE ADMINISTRATION OF ITS DUTIES.

Whether or not a city is liable for negligence in the administration of its duties depends entirely upon the nature of the duty being performed at the time of the negligence. The natural duties of a city are divided into two classes. There are those sovereign duties which it performs for the general public by virtue of its share in the sovereignty of the state from which it derives its existence. These are classified in the books as its governmental functions. On the other hand, the city has a private corporate side in the maintenance of which it is called upon to perform duties for itself. These are known as its ministerial duties. In the exercise of the first of these, it is exempt from civil liability for negligence while in the exercise of the second class of functions it stands on an equality with individuals and private corporations. *Denver v. Maurer,* 47 Colo., 179.

A municipal corporation is not impliedly liable to an action for damages either for the non-exercise of, or the manner in which in good faith it exercises discretionary powers of a public or

legislative character. But liability attaches when the duty ceases to be governmental and becomes ministerial. *2 Dillon on Municipal Corporations,* 1157, Sec. 949; *Gregg v. Hatcher,* 125 S. W., 1007 (Ark.).

The great trouble the courts have met has been in deciding where one duty ends and the other begins. It has been difficult for the courts to draw, clearly and accurately, the line of demarcation between public or governmental duties, and private or corporate duties. They have not experienced any difficulty in determining whether the corporation is or is not liable for a refusal to discharge a public duty or for the manner in which it is discharged. Perhaps the most difficult place to draw the line has been between the duty to preserve the public health, which is universally regarded as a governmental duty, and the duty to keep the streets in proper repair, which is just as generally regarded as a purely ministerial duty. The performance of duties that relate to the preservation of the public health and the care of the sick are governmental duties and the city is not liable for negligence in such duties. The care of streets is a private or proprietary duty. *2 Dillon on Municipal Corporations,* Sec. 980.

In a recent case in the Appellate Court of Kentucky this question came up: The appellant, Kippes, was injured by sickness resulting from a drenching which she received from a hose bursting while an employee of the City of Louisville was flushing the streets. The court set forth as the only question to be considered whether or not the flushing of the streets of the city was a public duty undertaken by the city in the exercise of its governmental functions, for the benefit of the people and the public generally, or a service performed by the municipality for private or corporate purposes, as distinct from its duty to the public generally. The court answered the question by laying down the rule that a city engaged in flushing its streets, in the interest of its inhabitants and of the safety of the general public, and making no profit for such service, is exercising a governmental duty; and hence a person receiving personal injuries from the negligence of its employes, or from defective hose used while flushing the streets, has no action against the city. *Kippes v. City of Louisville,* 131 S. W., 184. The courts of Kentucky recognize the distinction that has been pointed out above and agree that the care of streets is a city's ministerial duty. In the case of *Schwalk's*

Administrators v. The City of Louisville, 122 S. W., 860, the court says the rule that municipalities are liable for negligence in not keeping their streets in repair affords an exception to the general rule that municipalities are exempt from liability for negligence in the performance of a public governmental duty imposed upon them for corporate benefit, and for which they receive, in their corporate capacity, no pecuniary benefit. However, the Kentucky court is not without authority from other jurisdictions when it draws the line thus close to the border.

The Supreme Court of Georgia draws as close a distinction in the case of *Love v. Atlanta,* 95 Ga., 129. In this case, a mule attached to a garbage cart of the city and being driven by a small colored boy, ran away and ran into the plaintiff's buggy and injured him. The court declared that the duty of keeping the streets of Atlanta clear of offensive and dangerous matter devolves upon the city board of health. The functions of this department of the city government are purely governmental and not ministerial in their character. It follows that if in the exercise of such functions and in the discharge of the duties devolving upon this department thereunder, a private citizen is injured by the negligence of one of its servants in and about such work, no right of action arises against the city.

In a Tennessee case where the driver of a city street sprinkler allowed it to collide with the buggy of the plaintiff, injuring his wife, the court decided in an action for damages against the city that a city is not liable for the negligence of the driver of a street sprinkler in colliding with and overturning a buggy and thereby injuring its occupant. The employee is, in such case, engaged in the performance of a governmental, not of a mere ministerial, duty. *Conelly v. Nashville,* 100 Tenn., 262.

The New York court disapproves these last two cases and their doctrine is perhaps opposed to the weight of authority. In the New York case, the plaintiff while attempting to board a street car was struck by a cart in the city street cleaning department and the court held the city liable for the negligence of the driver. It said the duty of removing the dirt accumulating in the streets and the ashes and garbage from the abbutting residences is no part of the city's governmental powers and hence it is liable for the torts of its agents while engaged in this work. Referring to the

Georgia and Tennessee cases above, it said (with the greatest deference to the learned courts by whom these decisions have been promulgated): "We think they proceed upon a fundamental misconception of the duty discharged by the municipality. That a city is not liable for actions of its health department, we concede to its fullest extent. But the work undertaken by the city in these cases is not at all a part of the governmental work or duty of the state in protecting the health of its citizens. * * * * These duties of removing ashes and garbage from the lots of private residences were formerly private duties and are only taken over by the city's cleaning department as has been the disposal of sewage by the public sewer system and furnishing of water by the city water works because of the complexity and restrictions of a crowded urban life." *Quill v. Mayor, etc., of N. Y.*, 55 N. Y. Supp.,889. The New York cases are collected in *Missano v. The Mayor*, 160 N. Y., 123. In this case the plaintiff's child was run over and killed by a horse attached to an ash cart of the city and the plaintiff was allowed to recover.

The Colorado court recognized that the general duty of a municipal corporation to preserve the public health is a governmental duty and the city is not liable for the negligence of its employes in the performance thereof, but it declared that the flushing of a storm sewer was but an act necessary to keep the streets in a reasonably fit condition and was a private corporate duty, although also done to remove a menace to the health of the people, and the court held the city was liable for the negligence of its employes in the performance of the work. *Denver v. Maurer*, 47 Colo., 179.

Where in the exercise of its corporate powers a municipal corporation creates or permits a nuisance by nonfeasance or misfeasance, it is guilty of a tort and liable to damages in a civil action to any person suffering special damages therefrom. *Brown v. Scruggs*, 141 Mo., 632; *Gordon v. Village of Silver Creek*, 112 N. Y. Supp., 54. A city is liable for maintaining a nuisance in the way of a dumping ground for garbage and refuse taken off the streets. In the case of *City of New Albany v. Slider*, 21 Ind. App., 392, the city maintained a dumping ground near the plaintiff's residence. Sickness was caused in his family as a result and the court awarded him damages, saying, a municipal corporation is liable in damages for maintaining a nuisance the same as an in-

dividual. The fact that the plaintiff was a resident of the city and the city committed the act complained of in an effort to keep its streets clean for the benefit of the public, will not destroy his right to maintain an action against the city for creating a nuisance. The city of San Antonio (Texas) was sued for trespass in driving its garbage wagons across a vacant lot belonging to the plaintiff. The court in awarding the plaintiff damages said, that a city in cleaning its streets and disposing of its garbage acts for the benefit of its own people, and not in the discharge of a duty to the general public, primarily resting on the state, and is liable for damages caused by the unlawful acts of its officers in so doing. *Ostram v. City of San Antonio,* 94 Tex., 523. These decisions are in line with the Federal court on this subject.

A railroad company permitted the city of Denver to maintain a dumping ground for the city's garbage on some of its waste lands. Fire broke out in the refuse and spread to the plaintiff's buildings destroying them. The court held that the gathering of refuse and waste by a city and the maintenance, establishment and operation of a dumping ground for its ultimate disposal, under the direction of the officers of the city health department, is a duty of local or municipal concern, not performed in the exercise of any governmental function; and hence the city is liable for the negligence of its officers and agents engaged in the performance of such work. *Denver v. Porter,* 126 Fed., 288.

A number of cases have discussed this question in the matter of lighting the streets of the city, under circumstances that seemed to mingle the corporate and the governmental duties of the city. A plaintiff's wife was injured by reason of driving into an excavation in the street which was not properly lighted and which was made by the city in putting in a city water works. The plaintiff was allowed to recover even though the city was engaged in constructing a municipal water plant. *Butler v. Bangor,* 67 Me., 385. A municipal corporation, which, by its charter, has the power to lay out, improve, light and keep its streets in order, is liable in damages at the suit of an individual who sustains injuries by reason of the neglect of the corporation to keep its streets in a proper and safe condition. *Noble and wife v. City of Richmond,* 31 Gratt. (Va.), 271. The Supreme Court of Illinois has held that a city is under no obligations to light its streets even when granted power by its charter to do so, but if it assumes the duty under a

discretionary power and does it in such a negligent manner as not to afford proper security from danger, and a person is injured by falling into an excavation in the night time it is liable for the injuries thereby sustained. *City of Freeport v. Isbel,* 83 Ill., 440; *City of Chicago v. Powers,* 42 Ill., 169.

From the cases cited it would seem that while there has been no difficulty on the part of the courts in classifying the powers and duties of municipal corporations, yet there has been difficulty in determining into which class certain specific acts would fall. And it seems farther that by the weight of authority the courts are disinclined to draw too strict a line so as to exempt a municipal corporation from liability to the detriment of private rights.

FEDERAL JURISDICTION,—HOW EFFECTED BY THE DUE PROCESS OF LAW CLAUSE IN THE STATE CONSTITUTIONS.

The jurisdiction of the federal courts is a question which has given a great field for learned and technical arguments, bringing forth a diversity of opinion as to its extent. The jurisdiction of these courts has been settled with respect to certain matters, but there are still some cases in which the jurisdiction is open to question, and which have not yet been decided by a court of last resort. Article three, section two, of the federal constitution, says, "that the judicial power of the U. S. shall extend to all cases in law and equity arising under this constitution." The fourteenth amendment to the constitution, in the first article, provides that, "no state shall deprive any person of life, liberty or property without due process of law." When the same clause, or one which in effect is the same, is found in the state constitution, the question is, must the complainant first exhaust his remedies in the state courts before the jurisdiction attaches to the federal courts? This question Circuit Court Judge Morrow answers in the affirmative, in a case decided February 6 in the Circuit Court of Appeals for the Ninth Circuit.

The case referred to above is that of the *Seattle, Renton and Southern Railway Co. v. The Seattle Electric Co.,* reported in the San Francisco *Recorder,* February 14, 1911. The case was one involving a grant of franchise to two railway companies over